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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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No. 71-450

OCTOBER TERM, 1971

STATE OF OHIO, EX REL., DONALD E. MULLIN, ET AL.,

Petitioners,

VS.

THE CITY OF MANSFIELD, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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STATE OF OHIO, EX REL., DONALD E. MULLIN, ET AL.,

Petitioners,

vs.

THE CITY OF MANSFIELD, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio in the above-entitled case, said judgment having been entered on May 12, 1971.[1]

OPINION BELOW

The opinion of the Supreme Court of Ohio is printed in Appendix F hereto, infra, page 33, and is reported in 26 Ohio St. 2d 129.

JURISDICTION

The judgment of the Ohio Supreme Court was entered in May 12, 1971, Appendix E hereto, infra, page 32. Re-

1. *Petitioners* are Donald E. Mullin and eighty (80) other police officers of the City of Mansfield, Ohio.
Respondents: The City of Mansfield, Ohio, Paul L. White, Director of Department of Public Safety, Thomas C. Hoffman, City Auditor, Richard H. Ebbert, City Treasurer and the Municipal Civil Service Commission, all of the City of Mansfield, Ohio.

hearing was denied on June 30, 1971, Appendix H, hereto, infra, page 41. The jurisdiction of this Court is invoked under 28 U.S.C. 28 U.S.C. §1257 (3).

QUESTION PRESENTED

Whether consistent with the due process clause of the Fourteenth Amendment to the United States Constitution, the Supreme Court of Ohio may, in ruling on a motion for judgment on the pleadings, resolve a controverted material issue of fact in favor of the moving party where no evidence in support of either party's position on that issue is before the Court and resolution of the controverted fact is basic to the judgment of the Court?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment:

> "Section 1. . . . No state, shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners, approximately eighty (80) in number hold positions from chief to patrolman in the Police Department of the City of Mansfield, Ohio.

In November, 1969, an initiative ordinance appropriating fifteen percent (15%) of the proceeds of a city income tax to the police department salary fund and raising the salaries of police officers was enacted by favorable vote of the citizens of Mansfield, Ohio. The salaries specified in the initiative ordinance were paid to those

police officers for one pay period. During this period, however, the City Council by emergency legislation repealed the initiative ordinance and reduced the salaries of its police officers, the petitioners herein.

Thereafter, petitioners instituted an original action in the Supreme Court of Ohio by petitioning for a writ of mandamus requiring respondents to pay them the salaries specified in the initiative ordinance. The basis of petitioners' action was Section 143.27 of the Ohio Revised Code which provides that no person in the classified civil service shall be reduced in pay except for malfeasance, misfeasance or nonfeasance.

Respondents filed an answer admiting the reductions in pay and containing several defenses, only one of which is pertinent to this petition. (Respondents' answer is printed in Appendix B, infra, page 13.) The defense pertinent to this discussion averred that the reductions in petitioners' salaries were "motivated by financial inability and other economic considerations facing the city."

Petitioners denied the allegation of financial inability and other economic considerations in a written reply to respondents' answer. (Appendix C, infra, page 16.)

The issues having thus been framed, petitioners filed a motion for judgment on the pleadings claiming a right to judgment in their favor as a matter of law by reason of respondents' admission of the reductions in pay and the prohibition against salary reductions during good behavior in Section 143.27 Ohio Revised Code. Respondents in turn filed a cross motion for judgment on the pleading alleging that civil service laws must be construed to recognize the power of cities to establish the number of city employees and their pay. No exhibits were filed in support of either party's motion.

The Supreme Court of Ohio sustained respondents' motion for judgment on the pleadings by denying petitioners', the writ of mandamus saying that, "Under the provisions of Section 3 of Article XVIII of the Constitution of Ohio, a noncharter city has the power to establish by ordinance the pay scales in each of the various civil service classifications of the municipality for economic reasons." [2]

Petitioners filed an application for rehearing protesting that the Supreme Court of Ohio's resolution of the controverted issue of economic necessity denied petitioners the opportunity to present evidence on that issue and thereby violated their rights under Section 1 of the Fourteenth Amendment to the Constitution by depriving them of property without due process of law. The application for rehearing is printed in Appendix G, infra, page 39. Petitioners' application for rehearing was denied by judgment of the Court on June 30, 1971 (Appendix H infra, page 41.)

REASONS FOR GRANTING THE WRIT

1. The question presented in the instant case is of the utmost importance, not only to every police officer in the State of Ohio, but also to every public employee.

The decision of the Ohio Supreme Court introduces confusion into the law in Ohio regarding tenure in pay of *all* public employees. The judgment of the Court deprived relators of their rights under Section 1 of the Fourteenth Amendment to the United States Constitution by depriving them of property without due process of law.

2. The question presented is also of importance to

2. Quoted from paragraph 1 of the syllabus of the Court's decision which is printed in Appendix F herein, infra, page 33.

every litigant in this state, and all other states. The Ohio Supreme Court, in ruling on cross motions of the parties for judgment on the pleadings, ruled on material issues of fact controverted by the pleadings with no evidence on those issues before it and thereby denied the relators their day in court contrary to the provisions of Section 16, Article I of the Ohio Constitution.

This Court should review and correct the error of the Ohio State Supreme Court in assuming a slate of facts without any support in the record.

The law in Ohio was previously very clear in that in passing on a motion for judgment on the pleadings, only statements in the pleadings were to be considered.

In the case of *Myer v. Daniel*, 147 Ohio St. 27, (decided 1946), the Supreme Court of Ohio held that a motion for judgment on the pleadings is in the nature of a general demurrer and presents only questions of law.

In passing on a motion for judgment on the pleadings, the Court previously considered only statements in the pleadings. The Court was not permitted to consider evidence in any form. Therefore, the settlement of the question by this Court is plainly in the public interest, since it is likely to be presented in every case pending in Ohio now that the Ohio Supreme Court has permitted itself to rule on judgment on the pleadings when there existed distinct issues of fact.

In passing on the motion for judgment on the pleadings in the instant case, the Ohio Supreme Court went beyond the pleadings to resolve the factual disputes against relators without hearing any evidence and deprived them of their day in court. This was contrary to the long established principle of law that in passing on a motion for judgment on the pleadings, the court can consider only statements contained in the pleadings.

Ohio Civil Rule 12(c) is the same as the first sentence of Rule 12(c), Federal Rules of Civil Procedure. However, the Ohio Rule does not include the federal provision that converts such a motion into one for summary judgment when matters outside the pleadings are presented to and not excluded by the court. That language was added to the federal rule in the 1946 amendment thereof because of the advisory committee's belief that such practice should be tied to the summary judgment rule. It may be inferred that the Ohio courts will continue their former practice, namely that the court must look only to the pleadings in determining this motion. *Ohio Civil Practice,* William E. Knepper, Volume 1, Section 4.05, page 91.

3. Further, the judgment of the Ohio Supreme Court denied relators, and in effect all other public employees, equal protection under the laws contrary to the provisions of the Fourteenth Amendment to the United States Constitution, because as a class of employees in a non-charter city, relators are not being treated the same as other employees similarly situated in other non-charter cities in that by the judgment in this case relators are stripped of the right given them by legislation enacted pursuant to the mandate of Section 2 of Article XVIII of the Ohio Constitution.

CONCLUSION

Petitioners respectfully submit the decision of the Ohio Supreme Court was based on their finding that the action of the City Council of Mansfield, Ohio, in repealing the initiative ordinance and reducing petitioners' salaries was based on economic reasons. This fact though alleged and denied in the pleadings was unsupported by evidence and the denial of these petitioners' right to present evidence in support of their denial clearly denied them equal protection under the laws and denied them

their explicitly vested right to tenure in pay status vested by the provisions of Section 143.27, Ohio Revised Code

Petitioners asserted their claim that their rights under Section 1 of the Fourteenth Amendment to the United States Constitution had been abridged at the earliest possible time, that is in an application for rehearing and under these circumstance the doctrine announced by this Court in the case of *Postal Telegraph Cable Co. v. City of Newport, Kentucky,* 247 U.S. 464 (1918), should apply. Paragraphs one and two of the syllabus of this case read as follows:

> "1. This Court will review and correct the error of a state supreme court, in assuming a state of facts without any support in the record as a basis for denying asserted federal rights.
>
> "2. When a case has been disposed of on the pleadings, every uncontroverted allegation by the unsuccessful party must be taken as true, including denial of material facts previously avered by his opponent."

Justice Hughes made a similar statement in the case of *Northern Pacific Railroad Co. v. State of North Dakota,* 236 U.S. 585 (1915) when he states at page 593 that:

> "This Court will review the findings of facts by a state supreme court where a federal rights has been denied as a result of a finding shown by the record to be without evidence to support it."

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DONALD M. COLASURD,
8 East Broad Street
Columbus, Ohio 43215
Attorneys for Petitioners

APPENDIX A

PETITION FOR WRIT OF MANDAMUS

No. 70-172

SUPREME COURT OF OHIO

DONALD E. MULLIN, ET AL.,

Relator,

v.

THE CITY OF MANSFIELD, ET AL.,

Respondents.

Filed March 31, 1970

1. Relators for their cause of action state that they are, and at all times pertinent hereto, were members of the Police Department of the City of Mansfield, Ohio; that the questions involved in this action are of common or general interest to many persons, such parties being very numerous, to wit, more than eighty (80) police officers; that in addition the questions involved herein are of interest to all the voters and citizens of the City of Mansfield, Ohio.

2. Relators state that the Respondent, City of Mansfield, is a non-charter Municipal Corporation organized and existing under the Constitution and Laws of the State of Ohio.

3. Relators further state that Respondent, Paul L. White is Director of the Department of Public Safety of the City of Mansfield, Ohio, and that as Chief Administrative Officer of that department he is charged with the responsibility of preparing and approving the pay-

roll for all police officers, employed by the City of Mansfield, Ohio, and forwarding the same to the Municipal Civil Service Commission of the City of Mansfield, Ohio.

4. Relators further state that Respondent, Municipal Civil Service Commission of the City of Mansfield, Ohio, pursuant to the provisions of Section 143.39 of the Ohio Revised Code, is charged with the responsibility of certifying to the City Auditor the employment and position of each officer and employee listed on the City payroll, including relators.

5. Relators further state that Respondent, Thomas C. Hoffman, is the duly elected and acting auditor of the City of Mansfield, Ohio, and as such is charged with the responsibility of issuing his warrants to the City Treasurer for the amounts listed on payroll vouchers certified by the Municipal Civil Service Commission.

6. Relators further state that Respondent, James R. Kochheiser, is the duly elected and acting Treasurer of the City of Mansfield, Ohio and as such is charged with the responsibility of making payment on warrants of the City Auditor for salaries of all officers and employees of the City of Mansfield, Ohio.

7. Relators further state that an initiative ordinance was submitted to the voters of the City of Mansfield, Ohio on November 4, 1969; that the provisions of this ordinance appropriated fifteen (15%) percent of City's future income tax proceeds to the police department salary fund and established the following salary ranges for police officers of the City of Mansfield, Ohio.

(1) Salary for patrolmen during the probationary period of one (1) year Six Thousand Three Hundred Eighteen ($6,318.00) Dollars per year; for the second year, Seven Thounsand Five Hundred Fourteen ($7,514.00) Dollars per year; and after

the second year, Eight Thousand Nine Hundred Forty-four ($8,944.00) Dollars per year.

(2) There shall be an increment of sixteen (16%) per cent of the salary between each successive grade of the Officers of said Department.

(3) After two (2) years of continuous service with the Division of Police, each non-sworn member of such Division of Police shall receive an increment of sixteen (16%) percent of the salary established by Council for such non-sworn member.

(4) There shall be established a cost of living wage increase to each member of the Division of Police predicated upon the Bureau of Labor Statistics Consumer Price Index to be granted quarterly in accordance with the increase of index levels exceeding that effective on the 1st day of July, 1970.

8. Relators further state that said initiative ordinance received the required number of favorable votes for passage which fact was certified by the Richland County Board of Elections to the City of Mansfield, Ohio, on or about November 19, 1969.

9. Relators further state that as a result of said initiative ordinance the salaries of police officers of the City of Mansfiield, Ohio were set at the following approximate sums:

Patrolman (1st year probationary period)	$ 6,318.00
Patrolman (During 2nd year of employment)	7,514.00
Patrolman (After two years service)	8,944.00
Sergeants	10,375,04
Lieutenants	12,038.04
Captains	13,936.08
Chief	16,195.93

10. Realtors further state that commencing on November 29, 1969, the first payroll period following certi-

fication of the election results on the initiative petition, all police officers of the City of Mansfield, Ohio were paid by said City, the salaries established by the initiative ordinance, but, that on December 12, 1969, the end of said payroll period the Council of the City of Mansfield enacted an emergency ordinance establishing the number of employees for each department of said City and establishing salary levels for all City officers and employees.

11. Relators further state that the provisions of said emergency ordinance (Ordinance 69-570) established salary levels for police officers holding the rank and position of relators at a level substantially below the salary which relators were being paid pursuant to the provisions of the aforementioned initiative ordinance.

12. Relators further state that from December 12, 1969, to the present date the City of Mansfield, Ohio and respondents have failed and refused to pay relators the compensation to which they are entitled, namely the compensation established by, and paid to them pursuant to, the terms of the initiative petition, but instead, have paid them at the reduced salary established by ordinance 69-570, contrary to the provisions of Section 143.27 of the Ohio Revised Code.

13. Relators further state that the Municipal Civil Service Commission of the City of Mansfield, Ohio, pursuant to their inquiry, had been advised in writing by the Director of State Personnel, that except where employees execute written agreements to demotions or reductions in compensation, such reductions can be made only for the causes set forth in Section 143.27 of the Ohio Revised Code.

14. Relators further state that respondents have a clear and legal duty to pay relators the compensation established by, and previously paid pursuant to, the pro-

visions of the initiative ordinance, because of the provisions of Section 143.27 of the Ohio Revised Code which prohibits reductions in pay of Civil Service employees, except for the causes stated therein; that the respondents had no legal authority to reduce the pay of the relators and such action was a gross abuse of discretion, unlawful, illegal, arbitrary, contrary to and in clear violation of Section 143.27 of the Ohio Revised Code.

15. Relators further state that they have no plain and adequate remedy in the ordinary course of the law for the reason that the provisions of Section 731.08 of the Ohio Revised Code authorize City Council to establish the salaries of city employees and all police officers not employed by the City of Mansfield during the time the initiative petition was in effect and paid pursuant to its provisions, would, in fact, be subject to the provisions of Ordinance 69-570 as amended by 70-37.

WHEREFORE, Relators pray that a Writ of Mandamus be issued requiring the respondents, and each of them to do or cause to be done, all lawful acts necessary to cause the relators to be compensated in accordance with the salaries established by the provisions of the initiative ordinance, by reimbursing relators for monies unlawfully withheld from them from December 12, 1969, to the date of the issuance of said writ and requiring said respondents to continue to do, or cause to be done, all lawful acts necessary to cause the relators to continue to be compensated in accordance with the salaries established by the provisions of said initiative ordinance and such other and further relief as may be just and equitable.

APPENDIX B

ANSWER TO PETITION FOR WRIT OF MANDAMUS

No. 70-172

SUPREME COURT OF OHIO

DONALD E. MULLIN, ET AL,

Relator,

vs.

THE CITY OF MANSFIELD, ET AL.,

Respondents.

Filed April 9, 1970

First Defense

Now come the respondents and for answer to the petition of the relator admit the allegations in numbered paragraphs 2, 3, 4, 5, 7, 8, 9 and 10 of the petition and deny the allegations contained in numbered paragraphs 1, 6, 11, 12, 13, 14 and 15.

Second Defense

For their second defense, the respondents allege that the relator, Donald E. Mullin, did on the 29th day of December, 1969, file his petition in the Common Pleas Court of Richland County, Ohio, being Case No. 43947, against respondents Thomas Hoffman and James R. Kochheiser as Auditor and Treasurer, respectively, of the City of Mansfield, wherein relator, Donald E. Mullin, prays, inter alia, for the same relief prayed in his petition herein, to wit, for a writ of mandamus directing the

respondents to make salary payments to the relator and others pursuant to the provisions of the ordinance adopted by initiative petition on 4 November, 1969. A copy said petition is attached hereto, marked "Exhibit A", and incorporated herein as though fully rewritten herein.

These respondents allege further that the aforesaid litigation is still pending in said Richland County Court of Common Pleas and has not been decided or adjudicated by the Court.

Third Defense

For their third defense the respondents allege that the initiative petition adopted on the 4th day of November, 1969, upon which the relator relies for the relief prayer, was duly repealed by the legislative authority of the City of Mansfield on the 12th day of December, 1969, by Ordinance No. 69-570; that such repeal was reaffirmed by provisions of Ordinance No. 70-5, duly enacted by the legislative authority of the City of Mansfield on the 6th day of January, 1970, and that the relators are presently being paid salaries under the provisions of Ordinance No. 70-37, duly enacted by the legislative authority of the City of Mansfield, on the 20th day of January, 1970, which salaries are as follows, all per annum:

Probationary Patrolmen	$ 7,030.00
Patrolmen	8,154.00
Sergeants	8,570.00
Lieutenants	9,464.00
Captains	10,442.00
Chief	11,502.00

Fourth Defense

For their fourth defense, respondents allege that the salary changes effected by the legislative authority of the City of Mansfield were motivated by financial inability

and other economic considerations facing the city; that such changes were not in any manner or form disciplinary, punitive or discriminating against the relators and do not effect their tenure with the city within the purview of Section 143.27, Ohio Revised Code.

Fifth Defense

That by reason of the repeal of the initiative petition and the establishment of new salaries by the legislative authority of the City of Mansfield, the respondents, as duties under their respective offices, are specially enjoined to perform under the new salary ordinances.

Sixth Defense

The relators have a plain and adequate remedy in the ordinary course of law and are pursuing that remedy through the litigation initiated by them in the Court of Common Pleas, Richland County, Ohio, which litigation is pending and seeks the same relief as prayed in their petition herein.

Seventh Defense

That the provisions of the initiative ordinance adopted on the 4th day of November, 1969, are unlawful and contrary to the provisions of Section 143.34, Revised Code of Ohio, in that they provide for different salaries within the rank of patrolmen.

Eighth Defense

That the admissions, denials, allegations and averments contained in defense No. 1 through No. 8, are in each instance incorporated in each other as though fully rewritten therein.

Wherefore, having answered fully, respondents pray that the petition of the relators be dismissed at relators cost.

APPENDIX C

REPLY TO ANSWER

No. 70-172

SUPREME COURT OF OHIO

DONALD E. MULLIN, ET AL., RELATOR

V.

THE CITY OF MANSFIELD, ET AL.,

RESPONDENTS

Filed April 23, 1970

1. Now come the Relators and for their reply to the first defense set forth in the answer of the Respondents, say that they deny each and every statement and allegation contained in said first defense which is not an admission of the facts and allegations contained in Relators' petition.

2. Relators, for their reply to Respondents' second and sixth defenses, admit that Donald Mullin, a Relator herein, did file an action in the Common Pleas Court of Richland County, Ohio, being Case No. 43947, but specifically deny that said action prayed for the same relief as prayed for in this action; that said litigation is still pending as alleged in Respondents' second defense and further specifically deny that said litigation affords them a plain and adequate remedy in the ordinary course of law for the following reasons:

A. The action pending in the Common Please Court of Richland County is a taxpayers' action filed on behalf of the City pursuant to Section 733.59 of

the Ohio Revised Code, which challenged the manner in which Mansfield Ordinance #69-570 was enacted — see Exhibit A attached to Respondents' Answer.

B. The within action is an action by employees of the City of Mansfield seeking enforcement of their rights under the provisions of a State statute, to-wit: Section 143.27 of the Ohio Revised Code. Thus, the parties in the two actions are different and the subjects of the two actions are different.

C. The procedural aspects of enacting Mansfield Ordinance #69-570 challenged by the taxpayers in the case in the Richland County Common Pleas Court were tacitly admitted by the Mansfield City Council to be true and were corrected by subsequent legislation.

D. Said taxpayers' action was dismissed prior to the filing of this reply.

3. Relators, for their reply to Respondents' third defense, admit that the salary schedule set forth therein is a correct listing of the salary schedule under which the Relators are presently being paid, and further replying deny each and every other statement and allegation set forth therein.

4. Relators, for their reply to Respondents' fourth, fifth, seventh and eighth defenses deny each and every allegation and statement set forth therein.

5. For further reply to the answer of the Respondents, Relators deny each and every statement and allegation contained in Respondents' answer except such as are herein admitted and except such allegations and averments as admit the allegations of Relators' petition.

WHEREFORE, Relators pray that they be granted all relief prayed for in their petition, and that the answer of said Respondents be dismissed at their cost.

APPENDIX D

RESPONDENTS MOTION FOR JUDGMENT ON THE PLEADINGS

No. 70-172

SUPREME COURT OF OHIO

STATE OF OHIO OHIO, exrel.,

DONALD E. MULLIN, etal.,

Relators,

VS.

THE CITY OF MANSFIELD, ET AL.,

Respondents.

Now come the respondents under the provisions of Rule 12(c) of the Ohic Rules of Civil Procedure and move this Honorable Court to enter judgment in their favor on the pleadings heretofore filed and dismiss the complaint for Writ of Mandamus on the ground that there is no genuine issue as to any material fact and the respondents are entitled to judgment as a matter of law.

ROBERT K. RATH
City Solicitor
3 North Main Street
Mansfield, Ohio 44902

CERTIFICATION

I certify that on the 24 day of December, 1970, a copy of the foregoing Motion for Judgment on the Pleadings and Brief was mailed through the United States Mail to

Donald M. Colasurd, 8 East Broad Street, Columbus, Ohio, 43215 and to Duane F. Lantz, 50 West Broad Street, Columbus, Ohio, 43215, Attorneys for the Relators, by the undersigned.

ROBERT K. RATH
City Solicitor
3 North Main Street
Mansfield, Ohio 44902

Attorney for Respondents

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The fundamental purpose of civil service laws and rules is to establish a merit system, whereby selections for appointments in certain branches of the publice service may be made upon the basis of demonstrated relative fitness, without regard to political considerations, and the specific purpose of Section 143.27, Revised Code, is to protect the tenure and status of civil service employees against unjust or discriminatory disciplinary action by the appointing authority. The provisions of Section 143.27, Revised Code, may not be invoked by an employee where no discrimination is claimed and no charges have been made involving misconduct, inefficiency or other delinquency.	
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The laws and rules pertaining to civil service must be so construed so as to harmonize their provisions with other state laws relating to the powers and duties of the legislative authority of a city and the provisions of Section 143.27, Revised Code do not annul or control the authority of a city council to determine the number of employees and to fix employee wages and salaries under the provisions of Section 731.08, Revised Code.

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INTRODUCTION

With the consent of the Court, respondents propose that the accompanying brief in support of respondents motion shall also serve as respondents brief opposing relators motion for judgment on the pleadings.

ROBERT K. RATH
City Solicitor

Attorney for Respondents

STATEMENT OF FACTS

Reduced to the minimum, the essential facts which are not in dispute are:

1. By initiative ordinance duly approved by the proper electorate salary increases were established for members of the Police Department of the City of Mansfield, Ohio, a co poration under the General Statutory Plan.
2. Thereafter, by duly enacted emergency ordinance the Legislative Authority of the City of Mansfield established the number of employees for each department of the city, including the Police Department, and established salaries or wages for all city officers and employees. Said emergency ordinance resulted in salary decreases for members of the Police Department below those established by the initiative petition but higher than those in effect prior to adoption of the initiative petition.
3. The salaries established by the initiative petition were paid (for 2 weeks) to members of the Police Department between the effective date of the initiative petition and the effective date of the emergency ordinance, but not thereafter.
4. The reduction in salary of the employees of the Mansfield Police Department were not based on malfeasance, misfeasance, non-feasance, or other disciplinary reasons, but were based solely on the legislative enactment of Council for alleged economic reasons.

Proposition of Law No. 1

The fundamental purpose of civil service laws and rules is to establish a merit system whereby selections for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations, and the specific purpose of Section 143.27, Revised Code, is to protect the tenure and status of civil service employees against unjust, arbitrary or discriminatory disciplinary action by the *appointing authority*. The provisions of Section 143.27 may not be invoked by an appointee where no discrimination is claimed and no charges have been made involving misconduct, inefficiency, or other delinquency.

ARGUMENT

It is clear that the provisions of Section 143.27, Revised Code, are an expression by the General Assembly of its legislative policy relating to disciplinary measures against classified employees, formulated to control the actions and discretion of those who are to administer the civil service laws, and are not directed or intended to control or restrict the powers of a legislative authority. The section (see Appendix 1) relates to disciplinary reduction in pay or position, suspension or removal and prevents an *appointing authority* from imposing such disciplinary action when the same is done arbitrarily, unjustly or discriminatorily. Thus the section requires the *appointing authority* to furnish the employee with a copy of the order of reduction, suspension or removal; requires the Civil Service Commission to notify the *appointing authority* in the event of an appeal; allows the *appointing authority* or the employee to appeal to the

Court of Common Pleas in cases of removal or reduction in pay for disciplinary reasons, etc.

"Appointing authority" as defined in Section 143.01 (D), Revised Code, clearly does not include the Council of a city under the General Statutory Plan, to wit:

"(D) 'Appointing authority' signifies the officer, commission, board or body having the power of appointment to, or removal from, positions in any office, department, commission, board or institution."

"737.02, General Duties; Records; Contracts.

Under the direction of the Mayor, the Director of Public Safety shall be the executive head of the police and fire departments and the chief administrative authority of the charity, correction and building departments. He shall have all powers and duties connected with and incident to the appointment, regulation and government of such departments except as otherwise provided by law. . . . ."

(Section 737.02, Revised Code.)

"The fundamental purpose of civil service laws and rules is to establish a merit system, whereby selection for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations, and to safeguard appointees against unjust charges of misconduct and inefficiency, and from being unjustly discriminated against for religious or political reasons or affiliations. Those laws and rules may not be invoked by an appointee, where no discrimination is claimed and no charges have been made involving misconduct, inefficiency, or other delinquency." (Syllabus No. 4, *Curtis, Safety Director, et al., v. the State, ex rel. Morgan,* 108 Ohio St., 292.)

"The record does not disclose any violation of the civil service law, for the removal did not involve any question of misconduct or other disqualification of the appointees to discharge the duties of their positions. *The authority of the city officials to reduce* the number of employees, even though it affect those appointed

under civil service, when such action becomes necessary because of the condition of the finances of the city, cannot be questioned." (*Vansuch, Director, et al., v. State, ex rel. Fetch, et al.*, 112 Ohio St., 688, at Page 690-691.)

Relators contend (Relators Brief, Pages 8-9) that the repeal of Section 143.26, Revised Code, which precluded reduction in pay, etc., "for religious or political reasons or affiliations" and the inclusion thereof in amended Section 143.27 was intended to broaden the protection of classified employees and with this the respondents have no argument. This does not, however, negate the arguments above made that such protection is afforded only as against unjust arbitrary or discriminatory disciplinary action on the part of the appointing authority.

"All things forbidden in that language (Section 486-17 GC, and O.R.C. 143.26 until repealed) gather around the central thought of discrimination and the use of the word 'otherwise' is without point or meaning unless the terms 'reduced in pay or position', 'laid off', 'suspended', 'discharged' are understood as forbidden only in the sense that they amount to discrimination." (*Curtis v. State, ex rel.*, supra, at Page 298.)

"This is the only statute (GC 486-17a, O.R.C. 143.27 prior to amendment) granting an appeal to the Civil Service Commission, and it will be seen that such appeal is only granted in *removal* cases." (*Curtis v. State, ex rel.*, supra, at Page 300.)

"While the foregoing interpretation of the statutes and the rules of the commission is conclusive of this controversy, we are of the opinion that the same results must be reached, even though an appeal should be provided from all orders of reduction, lay-off, and suspension as well as orders of removal." (*Curtis v. State, ex rel.*, supra, at Page 302.)

The position of the relators that the salary of a classified employee cannot be reduced except upon grounds

which are "expressly set forth in Section 143.27" (Page 9, Relators Brief), necessarily connotates that such employees may not be reduced in position, suspended or removed except upon the same expressly set forth grounds. That this position is an exaggerated simplification is readily shown by reference to the next code section — 143.28 — which specifically provides for removals, reappointments and demotions in the police and fire departments when made necessary "through lack of work or funds or for causes other than those outlined in Section 143.27 of the Revised Code," e.g.,

> ". . . . when a position above the rank of patrolman in the police department and above the rank of regular fireman in the fire department *is abolished,* and the incumbent has been permanently appointed, *he shall be demoted to the next lower rank* and the youngest officer in point of service in the next lower rank *shall be demoted,* and so on down. . . ." (Emphasis added. For complete section see Appendix 2.)

It is to be noted that all members of the police department were affected by the emergency ordinance which reduced salaries and that such reductions were uniform by grade or rank. (Respondents Third Defense, Page 2 of Answer and Relators Admission, Page 2 of Reply.)

> "The philosophy of civil service legislation is parity between members of a class or group. The object is to prevent inequality of treatment for any reason whatsoever. The hypothesis is that individuals shall be rated by performance and merit rewarded; none shall be preferred within the group except as the result of standards applied indiscriminately." (*Niswonger, et al., v. City of Cincinnati, et al.,* 17 Ohio App. (2d) 200 at Page 204; 46 O.O. 2d 274 at Page 276.)

A further oversimplification which illustrates the inconsistency of interpretation of civil service laws by the relators is their assertion (Page 10, Relators Brief) that

"the within action does not challenge the validity of the ordinance repealing the initiative ordinance *as applied to employees hired after its passage* . . . ." It would appear that relators sanction different pay scales for policemen of the same grade or rank.

Proposition of Law No. 2

The laws and rules pertaining to civil service must be so construed as to harmonize their provisions with other state laws relating to the powers and duties of the legislative authority of a city and the provisions of Section 143.27, Revised Code do not annul or control the authority of a city council to determine the number of employees and to fix employee wages and salaries under the provisions of Section 731.08, Revised Code.

ARGUMENT

For text of Section 731.08, Revised Code, See Appendix 3.

> "There is nothing complex or difficult to understand about civil service laws and rules. The fundamental purpose is to establish a merit system, whereby selections for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations. To carry out this purpose elaborate rules have been formulated, designed to facilitate its operation, but not to extend it beyond its legitimate limits. . . . .
>
> If in the course of events it became necessary to determine whether the position should be continued or abolished, that was a question the legislative branch of the city government would have to decide. Again if the city is confronted by a temporary financial and economic difficulty, or if the legislative branch fails or refuses to make sufficient appropriations, thereby

making it impossible for the safety department to meet pay rolls, in such case the problem concerns only the public welfare, and is a political and economic one, and the Civil Service Commission has no duty or responsibility. . . .

The laws and rules pertaining to civil service must be so construed as to harmonize their provisions with other state laws relating to the powers and duties of city councils and service and safety departments of cities in the creation and abolition of offices and places of employment and in the appointment and discharge of officers and employees. Proper recognition must be given to the principle that in our multiple form of government certain mutual checks and balances are provided, while at the same time leaving to each department a well-defined independence in its proper sphere. Our legislation relative to the administration of our governments, national, state, county, and municipal, has grown to such bulky and unwieldy proportions, and so many offices and employments have been created, with elaborate and complex definitions of powers and duties, that overlapping and confusion seem inevitable. If in the instant case this court should feel compelled to yield to the claims of the relator as to the proper construction of the statutes and rules, it would still be necessary to declare that the appointing power is a separate, independent power of the safety department, free from any control on the part of the Civil Service Commission, except that of regulation in determining the fitness of the applicants and in safeguarding appointees against unjust discriminations and unjust accusations.

Any other view would manifestly lead only to endless confusion in the administration of municipal employment. It is, of course, important to properly and impartially administer the civil service rules and requirements, and to recognize the powers and duties of the Commission in the exercise of its proper prerogatives, but it is no less important that the safety department of our municipalities be equally free and

untrammeled in the exercise of its proper prerogatives. Whatever language may have been employed by the Legislature in the enactment of the civil service statutes, that language must be construed in the light of the underlying principles of the Civil Service Commission, as hereinbefore declared, and we cannot agree that the Legislature intended to empower the Commission to interfere with the administration of the city government in such a way that the working forces in the classified service could not be reduced in the interest of public economy and to prevent deficiencies in the public funds. It must be admitted that the responsibility of keeping the expenditures of the city within its income rests with the legislative branch of the city government and the service and safety departments, and not with the Civil Service Commission." (*Curtis, Safety Director, et al., v. the State, ex rel., Morgan*, 108 Ohio St., 292, at Pages 296, 297, 298, 302, 303 and 304.)

For an interpretation of repealed GC Section 486-17 precluding reduction in pay or position, etc., for religious or political reasons or affiliations see Board of County Commissioners of Huron County, et al., v. the State, ex rel., Clarke, 127 Ohio St. 341.

"It is well established in Ohio that the power to create a position in the civil service includes the power to abolish the position, particularly where the purpose of the abolishment of such position is that of economy or improvement in the public service." (*State, ex rel., Stine v. McCaw*, 137 Ohio St. 13, at Page 16.)

CONCLUSION

It is respectfully submitted that the foregoing authorities establish clearly that the civil service laws must be interpreted in the light of other state laws relating to the powers and duties of city legislative authorities; that Section 143.27, Revised Code, relates to grounds

upon which an appointing authority may impose disciplinary action; that the act of which complaint is made was the act of a legislative authority not an appointing authority, that accordingly the motion for judgment on the pleadings by relators should be denied and the similar motion of the respondents granted.

ROBERT K. RATH
City Solicitor

Attorneys for Respondents

APPENDIX E

ENTRY IN MANDAMUS

No. 70-172

SUPREME COURT OF OHIO

DONALD E. MULLIN, ET AL., RELATORS,

V.

THE CITY OF MANSFIELD ET AL.,

RESPONDENTS

Filed May 12, 1971

This cause originated in this court upon the filing of a petition for a writ of mandamus seeking an order from this court to compel the personnel and financial officers of Mansfield, Ohio, a non-charter city, to increase the salaries of the members of the city police department. An answer and briefs were filed and this cause was heard in the manner prescribed by law. On consideration thereof, the writ of mandamus is denied, for the reasons set forth in the opinion rendered herein.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to-wit, from Journal No. ____ Page ____.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court tnis 12th day of May, 1971.

THOMAS L. STARTZMAN, Clerk.
By S/Sam F. Adkins, Deputy.

APPENDIX F

DECISION

No. 70-172

SUPREME COURT OF OHIO

DONALD E. MULLIN, ET AL., RELATORS

V.

THE CITY OF MANSFIELD, ET AL., RESPONDENTS

Decided and Filed May 12, 1971

1. Under the provisions of Section 3 of Article XVIII of the Constitution of Ohio, a noncharter city has the power to establish by ordinance the pay scales in each of the various civil service classifications of the municipality for economic reasons.

2. The provisions of R. C. 143.27 set forth the grounds for reducing the pay or position, or suspending or removing an individual officer or employee in the classified service of a city for disciplinary reasons.

3. The provisions of R. C. 143.27 do not affect the power of a noncharter city to establish by ordinance the number of employees in a department of city government or to establish the pay scales in each of the various civil service classifications of the municipality.

O' Neill, C. J. This case poses the question: Do the provisions of R. C. 143.27 deny to a noncharter city council the power to reduce the salary scales of the classified employees of the city police department, by city ordinance, for economic reasons?

We hold (1) that the city council of a noncharter city has the power to reduce the salary scales of the classified employees of the city police department for economic reasons, and (2) that the provisions of R. C. 143.27 do not affect the power of a noncharter city, by ordinance, to establish the number of employees in a department of city government or to establish the salary scales for classified city employees.

This original action in mandamus seeks to compel the personnel and financial officers of Mansfield, Ohio, a noncharter city, to increase the salaries of the members of the city police department. The police salaries were raised by an initiated ordinance passed by a vote of the electorate on November 4, 1969, but, on December 12, 1969, after one pay period at the increased salaries, those salaries were reduced for economic reasons by an emergency ordinance passed by city council.

The relators, police officers, filed the petition, respondents filed an answer and both the relators and respondents filed separate motions for judgment on the pleadings.

The parties agree on the following statement of facts:

The salaries of members of the city police department were raised by an initiated ordinance, approved by the electorate. The increased salaries were paid for two weeks. The city council then passed an emergency ordinance to reduce the salaries below those established by the initiated ordinance, but higher than those in effect prior to the adoption of the initiated ordinance. The lower salaries provided by the councilmanic ordinance have been paid since its effective date. The reductions in salaries of the employees of the police department were not based on acts of misfeasance, malfeasance or nonfeasance, or other disciplinary reasons. Such reductions were based solely upon economic reasons.

The relators do not challenge the validity of the emergency ordinance passed by council repealing the initiated ordinance as applying to employees hired after its passage.

It is agreed by the parties to this action that the city council has the power to repeal, by ordinance, an initiated ordinance previously adopted by the electorate.

R. C. 143.27 provides, in pertinent part:

"*The tenure of every officer or employee in the classified service of the state* and the counties, cities, city health districts, general health districts, and city school districts thereof, holding a position under Sections 143.01 to 143.48, inclusive, of the Revised Code, *shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the Director of State Personnel or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.*

"In any case of reduction, suspension of more than five working days, or removal, the appointing authority shall furnish such employee with a copy of the order of reduction, suspension, or removal, which order shall state the reasons therefor. Such order shall be filed with the Director of State Personnel and State Personnel Board of Review, or the commission, as may be appropriate." (Emphasis added.)

There is no constitutional question involved in this case.

Section 3 of Article XVIII of the Constitution of Ohio provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This court held, in paragraph four of the syllabus of *State, ex rel., Canada, v. Phillips* (1958), 168 Ohio St. 191, 151 N. E. 2d 722, as follows:

"The words, 'as are not in conflict with general laws' found in Section 3 of Article XVIII of the Constitution, modify the words 'local police, sanitary and other similar regulations' but do not modify the words 'powers of local self-government.' "

The powers of the city council of a noncharter city to establish the number of employees to be employed in any city department and the pay scale classification of such employees is a basic and fundamental power of local government.

In *State, ex rel. Petit v. Wagner* (1960) 170 Ohio St. 297, 164 N. E. 2d 574, this court pointed out, at page 303:

" * * * It is apparent therefore that, by what they said, the people expressed an intention that, in the absence of the adoption of a charter pursuant to Section 7 or of the adoption of any 'additional laws * * * for the government of municipalities adopting the same' pursuant to Section 2, the 'general laws * * * for the * * * government of' municipalities authorized by Section 2 were to control a municipality in the *exercise* of the powers of local self-government conferred upon it by Section 3. Where a charter is adopted, then, under Section 7, the municipality 'may, subject to the provisions [*i. e.*, limitations] of Section 3 not Sections [2 *and* 3] * * * exercise thereunder [*i. e.*, under the charter instead of under general laws] all powers of local self-government.' The only

limiting provision then applicable is that specified in Section 3, that 'local police, sanitary and other similar regulations' shall 'not * * * conflict with general laws.' (Paragraph four of syllabus of *State, ex rel. Canada, v. Phillips, supra.*)"

See also, the case of *Leavers v. Canton* (1964), 1 Ohio St. 2d 33, which is based upon *Wagner, supra.*

Relators argue that the ordinance reducing the pay of the members of the police department is at a variance with the provisions of R. C. 143.27 and that therefore the ordinance is invalid under Section 3 of Article XVIII of the Constitution of Ohio and *Leavers v. Canton, supra.*

The error in relators' argument is that they misinterpret the language of the statute. Relators contend that, under R. C. 143.27, a city council of a noncharter city can *never* reduce the number of employees in a city department or the pay of such employees, regardless of the condition of the city's finances or the changing responsibilities and duties of a city department.

The unreasonableness of that contention is demonstrated by relators' statement that the city council could employ new policemen at the lower salary after the councilmanic ordinance reducing salaries was adopted. If relators were correct, the result would be that policemen holding the same classification and rank under civil service and performing the same duties would be drawing different salaries. Should economic conditions so affect city finances as to require another reduction in salaries there could well be three different salaries being paid to policemen in the same rank and classification, performing the same duties. The magnitude of the chaos which such an interpretation would create is apparent when it is realized that R. C. 143.27 applies not only to cities, but also to the state and several political subdivisions thereof.

The correct interpretation of R. C. 143.27 can be ascertained by a careful reading of the language. It is obvious that R. C. 143.27 provides that every officer or employee under civil service in the state, cities and certain political subdivisions of the state shall have tenure during good behavior and efficient service, and that they, as individuals, cannot be reduced in pay or position, suspended or removed *except* on certain specified grounds or failure of good behavior or acts of misfeasance, malfeasance or nonfeasance in office.

That section provides further than in any case of reduction in pay, suspension for more than five days or removal, the appointing authority must furnish the employee with a copy of the disciplinary order. The order is required to be filed with the proper disciplinary authority and must state the reasons for the disciplinary penalty imposed. The section then provides the appeal rights and procedures of the employee, governs the disciplinary actions of appointing authorities and sets forth the rights of employees who are disciplined.

A comparison of this section with former R. C. 143.26 (now repealed) makes it clear that R. C. 143.27 was drafted to protect individual civil service employees from political sanction and in no way limits the power of a city council of a noncharter city to establish the number of employees to be employed in an entire municipal department of government or the power to establish the pay scales in each of the various civil service classifications of the municipality.

The writ of mandamus is denied.

Writ denied.

HERBERT, DUNCAN, CORRIGAN, STERN and LEACH, JJ., concur.

SCHNEIDER, J., would also deny the writ, but for the reason that the relators have a plain and adequate remedy provided by law.

APPENDIX G

APPLICATION FOR REHEARING

No. 70-172

SUPREME COURT OF OHIO

DONALD E. MULLIN, ET AL.,

Relators,

v.

THE CITY OF MANSFIELD, ET AL.,

Respondents.

Filed May 12, 1971

Relators respectfully make application for hearing of this cause for the following reasons not heretofore presented to this Court, but apparent from the record in this cause and which are of such a substantial nature as to entitle relators to a rehearing. These reasons are:

1. This Court in ruling on cross motions of the parties for judgment on the pleadings ruled on material issues of fact controverted by the pleadings with no evidence on those issues before it and thereby denied relators their day in court contrary to the provisions of Section 16, Article I of the Ohio Constitution.
2. The judgment of this Court deprives relators of their rights under Section 1 of the Fourteenth Amendment to the United States Constitution by depriving them of property without due process of law as the judgment summarily denying the writ of mandamus precludes a hearing on the merits of the controverted material issues of fact raised by the pleadings, but resolved by this Court without

evidence, when those facts, as resolved by this Court constitute the basis of the judgment.

3. The judgment of this Court denies relators equal protection under the laws contrary to the provisions of the Fourteenth Amendment to the United States Constitution because, as a class of employees in this non-charter city, relators are not being treated the same as other employees similarly situated in other non-charter cities in that by the judgment in this case relators are stripped the right given them by legislation enacted pursuant to the mandate of Section 2 of Article XVIII of the Ohio Constitution.

APPENDIX H

ENTRY ON APPLICATION FOR REHEARING

No. 70-172

SUPREME COURT OF OHIO

DONALD E. MULLIN, ET AL.,

Relators,

v.

THE CITY OF MANSFIELD, ET AL.,

Respondents.

Filed June 30, 1971

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. ____, Page ____.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 30th day of June, 1971.

THOMAS L. STARTZMAN, Clerk.
By S/Sam F. Adkins, Deputy.